HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32(2)(b)

Description of the case.

W.P. No. 342/2005 S/S
Mohan Chandra Upreti & others
Vs
The State of Uttaranchal

Approved for reporting

Not approved for reporting

Date of decision 3.3.2006

Initial of Judge

Reserved

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ petition No. 342 (S/S) of 2005

Mohan Chandra Upreti, s/o Sri. Chintamani Upreti,
Ex-Forester, at present residing at Betalghat,
District Nainital.

.....Petitioner

VERSUS

1. The State of Uttaranchal through Secretary
   Department of Forests, Civil Secretariat, Dehradun.
2. The Conservator of Forest, South
   Kumaun Circle, Nainital, U.P. ..... Respondents

Sri C.D. Bahuguna, Advocate for the petitioner
Standing Counsel for the respondents.

Dated: 3.3.2006

Hon. Rajesh Tandon, J.

Heard Sri C. D. Bahuguna, counsel for the petitioner and Standing Counsel for the respondents.

The present writ petition has been preferred seeking a writ in the nature of Certiorari, quashing the order dated 28.2.2005 contained in annexure-3 to the writ petition. The petitioner has also claimed notional promotion on the post of Forester w.e.f. 25-05-1976 with all consequential benefits of promotion.

Briefly stated, the petitioner was directly appointed on the post of Plantation Zamadar, a class-III post, on 28-09-1965 and was posted in the Soil Conservation Division, Ranikhet, whereas one Shri Uttam Singh Nayal was initially appointed in the same division, namely, Soil Conservation Division,

Ranikhet, on the post of Mali, a class-IV post, as on 10-07-1964 but he was promoted to the post of Plantation Zamadar, a class-III post, on temporary basis in the same forest division as on 09-08-1967 i.e. after about two years from the date of appointment of the petitioner. According to the petitioner he was much senior to Shri Uttam Singh Nayal so far as appointment on the post of Plantation Zamadar is concerned. According to the petitioner, despite being much senior to Shri Uttam Singh Nayal, he was not confirmed on the post of Plantation Zamadar for a number of years but Shri Uttam Sing Nayal even being much junior to the petitioner, was confirmed on the post of Plantation Zamadar in the year 1976 after his transfer to the East Almora Forest Division, and he was provided confirmation to the post of Plantation Zamadar retrospectively w.e.f. 01-04-1973 and thereafter Shri Uttam Singh Nayal was further promoted to the post of Forester as on 25-05-1976.

The petitioner has submitted that it was sheer high handedness on the part of the departmental authorities that the petitioner who had put about 12 years service on the post of Plantation Zamadar till the year 1976 was not confirmed on that post and rather a junior person, namely, Shri Uttam Singh Nayal who had rendered less period of service on the post of Plantation Zamadar was confirmed on the post of Plantation Zamadar in the year 1976 with sole view to provide accelerated promotion to Shri Uttam Singh Nayal to the post of Forester.

According to the petitioner, after repeated requests made to the departmental authorities, the petitioner could be confirmed on the post of Plantation Zamadar as late as in the year 1984 whereas he was entitled for being confirmed on the

post of Plantation earlier to his junior colleague in the year 1976 itself. The petitioner was not granted retrospective confirmation on the post of Plantation Zamadar w.e.f. 01-04-1973 in the same manner as the junior person Shri Uttam Sing Nayal, had been granted confirmation on the post of Plantation Zamadar retrospectively w.e.f. 01-04-1973.

The petitioner filed a writ petition no. 4493 (S/S) of 2001 in this Court seeking a writ of mandamus to command the respondents to promote the petitioner to the post of Forester w.e.f. the date when junior to him has been promoted; and grant him all consequential benefits of service. During the pendency of the writ petition the petitioner was retired on reaching superannuation in the year 2002. The writ petition finally disposed of by this Hon'ble Court by judgment and order dated 21-06-2004, with the direction to the respondents to consider the case of the petitioner for grant of notional promotion in case any junior to the petitioner has been promoted to the post of Forester. In compliance of the judgment and order of this Hon'ble Court dated 21-06-2004, the respondent no.2 decided the case of the petitioner but rejected the claim of the petitioner for notional promotion to the post of Forester by the order dated 28-02-2005, against which order the present petition has been filed.

The submissions of the learned counsel for the petitioner are three fold-first, the petitioner was entitled to be confirmed on the post of Plantation Zamadar earlier to his junior colleague Sri Uttam Singh Nayal and the departmental authorities arbitrarily and whimsically confirmed the junior person Sri Uttam Singh Nayal on the post of Plantation Zamadar, ignoring

the candidature of the petitioner, which is violative of Article 16 (1) of the Constitution of India.

The Second submission of the learned counsel is that so far as for confirmation and promotion is concerned the petitioner has every right to be promoted under Article 16 of the Constitution of India. However, while promoting the junior person Sri Uttam Singh Nayal to the post of Forester without considering the case of the petitioner for such promotion, is violative of Article 16 of the Constitution of India, and therefore, the petitioner is entitled for getting all the benefits of promotion to the post of Forester w.e.f. the date when junior to the petitioner has been promoted to the post of Forester.

The first and second submissions of the learned counsel for the petitioner are co-related. The submission of the learned counsel is that the petitioner was entitled to be considered for confirmation on the post of Plantation Zamadar as also for promotion to the post of Forester earlier to his junior person Sri Uttam Singh Nayal and by not doing so, the department has acted in violation of Article 16 (1) of the Constitution of India.

The counsel for the petitioner has placed reliance on an authority of the Apex court rendered in the case- Bal Kishan Vs. Delhi Administration, reported in A.I.R. 1990 SC 100, wherein the Apex court has observed that no junior person can be confirmed or promoted on any post without considering the case of his senior and if it happens, it would be contrary to Article 16 (1) of the Constitution of India. The relevant portion of the judgment of the Apex court is reproduced as under:

> *"In service, there could be only one norm for confirmation or promotion of persons belonging to the same cadre. No junior shall be confirmed or promoted without considering*

the case of his senior. Any deviation from this principle will have demoralising effect in service apart from being contrary to Article 16(1) of the Constitution."

I find substance in the submission of the learned counsel for the petitioner to the effect that the petitioner was legally entitled for being confirmed on the post of Plantation Zamadar earlier to junior person, namely, Uttam Singh Nayal. The respondents have filed their Counter affidavit but have not denied this fact that the Sri Uttam Singh Nayal was promoted to the post of Plantation Zamadar two years later than the appointment of the petitioner on the post of Plantation Zamadar. Admittedly, the date of direct recruitment of the petitioner on the post of Plantation Zamadar is 28-09-1965 whereas the date of appointment by promotion of Sri Uttam Singh Nayal on the post of Plantation Zamadar is 09-08-1967. In view of the above, the action of the departmental authority to confirm the junior person on the post of Plantation Zamadar earlier to his senior was absolutely illegal and violative of Article 14 and 16 of the constitution of India.

The counsel for the State has submitted that the above authority-'Bal Kishan Vs. Delhi Administration' (Supra) is not applicable in the present case but I do not find substance in the submission of the counsel for the State. I have examined the above authority of the Apex Court and I am fully convinced that this authority is substance is fully applicable in the case of the petitioner.

In the case- Bal Kishan Vs. Delhi Administration (Supra), the department had wrongly promoted the appellant Bal Kisan, a junior person, ignoring the candidature of a senior person and subsequently when this fact came into the notice of the

department, it cancelled the promotion order of the appellant Bal Kisan. In that case the appellant Bal Kisan also took a plea that since he had been confirmed on the lower post earlier to the respondent, he had become senior to the respondent and as such he was first entitled for promotion to the higher post.

The Apex Court rejected the plea of the appellant and dismissed his civil appeal. In the present case also the department has taken the similar plea that since the junior person, Sri Uttam Singh Nayal, had been confirmed on the lower post of Plantation Zamadar earlier to the senior person (the petitioner), the junior person Sri Nayal, had been rightly promoted to the higher post of Forester earlier to the petitioner.

The third submission of the learned counsel for he petitioner is that the junior person Sri Uttam Singh Nayal was never confirmed on the post of Mali and even then he was promoted to the post of Plantation Zamadar in the year 1967 and the petitioner has been denied promotion to the post of Forester by the department only on the ground that till the year 1976 the petitioner had not been confirmed on the post of plantation Zamadar. The submission of the counsel for the petitioner is that the department has adopted double standard in matter of promotion in as much as in the case of Sri Nayal, he was promoted to the post of Plantation Zamadar without his being confirmed at all on the post of Mali, whereas the petitioner has been denied promotion on the post of Forester only on the ground that in the year 1976 when his junior person Sri Nayal was promoted to the post of Forester, the petitioner was not confirmed on the post of plantation Zamadar.

The learned counsel for the petitioner has referred Paragraph. 16 of the writ petition, which reads as under:

"16. That it is significant to point out here that both the persons, namely, the petitioner and Sri Uttam Singh Nayal were initially appointed in the same division, namely, Forest Soil Conservation Division, Ranikhet. Shri Nayal was initially appointed as Mali and he was not confirmed on the post of Mali. Sri Nayal was promoted to Class III post of Plantation Zamadar as on 09-08-1967 although he was not confirmed on the post of Mali. When Sri Uttam Singh Nayal was promoted as Plantation Zamadar on temporary basis, the petitioner was already serving on the post of Plantation Zamadar in the same Forest Division."

The counsel for the petitioner has submitted that the contents of Paragraph. 16 of the writ petition have not been specifically denied by the respondents in Paragraph. 16 of the Counter affidavit, and the evasive denial is no denial in the eye of law. Paragraph. 16 of the Counter affidavit reads as under:

" That the contents of paragraph. 16 to 20 of the writ petition as stated are misconceived and against the provisions of rules hence denied. True facts have been given in earlier Paragraphs of this affidavit".

In the Counter affidavit, it has not been stated by the respondents that the junior person Sri Uttam Singh Nayal was confirmed on the initial post of Mali at any point of time. In view of the above, I am inclined to hold that Shri Uttam Singh Nayal was never confirmed on the post of Mali and despite that he was promoted to the post of Plantation Zamadar as on 09-08-1967 and that the department adopted double standard in the matter of promotion as regards the petitioner and Sri Uttam Singh Nayal. If the junior person Sri Uttam Singh Nayal could

be promoted to the post of Plantation Zamadar without his confirmation on his initial post of Mali, there could not have been any hurdle in applying the same principle in matter of promotion of the petitioner to the post of Forester without his formal confirmation on the post of Plantation Zamadar. The department cannot be permitted to adopt double standard in similar situations and circumstances. In view of these facts, discriminatory attitude on the part of the departmental authorities in apparent, which is in violative of Article 14 of the constitution of India. The impugned order dated 28-02-2005 is, therefore, liable to be quashed on this ground alone.

The counsel for the petitioner has also referred Paragraphs 22 and 23 of the writ petition in which it is categorically stated that a number of persons who were not confirmed on the post of Plantation Zamadar, were promoted to the post of Forester in the year 1965 and thereafter. Paragraph 22 and 23 of the writ petition are reproduced to below:

"22. That it may be further stated that the confirmation has never been a consideration for promotion on the post of Forester. In the year 1965, 4 persons, namely, Beer Singh Bisht, Pitamber Pandey, Jwala Dutt Bhatt, Deviki Nandan Joshi, were promoted on the post of Forester from the post of Plantation Zamadar. They were not confirmed on the post of plantation Zamadar.

23. That after 1965 also some persons, namely, Sri Kailash Giri Goswami, Dhyan Singh Mandrawal, Ganesh Pujari and Ishwari Lal Arya who were also posted in Additional Soil conservation Division, Ram Nagar (Nainital) were promoted on the post of Forester from the post of Plantation Zamadar. These persons were not confirmed on the post of Plantation

Zamadar. Similarly, other persons have also been promoted on the post of Forester who wre not confirmed."

The counsel for the petitioner has submitted that the contents of Paragraph. 22 and 23 of the writ petition have not been specifically denied by the respondents in Paragraph 18 of the Counter affidavit, and the evasive denial is not denial in the eye of law. Paragraph 18 of the Counter affidavit reads as under:

"16. That the averments made in Paragraph. 22 and 23 of the writ petition are baseless and misconceived hence denied. In reply it is clarified that before 18 October, 1980 no service rules were in force for the members of Lower Subordinate Forest Cadre like Forest Guard and Plantation Zamadar/Moharrirs. Therefore, the allegations made by the petitioner in the Paragraph under reply are not tenable."

I find substance in the submission of the learned counsel for the petitioner so far as the promotion of the petitioner to the post of Forester is concerned.

There is no justifiable reason to deny the claim of the petitioner for notional promotion by means of the impugned order dated 22-02-2005, and as such the impugned order is not sustainable in law and is liable to be quashed.

The matter can be examined from another angle. It is a fact that petitioner was directly recruited to the post of Plantation Zamadar and thereafter he was appointed on temporary basis in the department. Normally a temporary employee or a probationer is confirmed after certain period of time if his work and conduct is found satisfactory. The petitioner had put-in a long period of 12 years of service on the

post of Plantation Zamadar till 1976, but still he was not confirmed on the post of Plantation Zamadar.

The counsel for the petitioner has placed reliance on an authority of the Apex court rendered in the case – Yashwant Hari Katakkar Vs. Union of India and others, (1996) 7 SCC 113, wherein the Apex Court held that if an employee is not confirmed or made permanent for a number of years, he will be deemed to have been confirmed or become permanent. The relevant portion of the judgment is reproduced as under:

"*The appellant having served the Government for almost two decades it would be unfair to treat him as temporary/quasi-permanent. Keeping in view the facts and circumstances of this case we hold that the appellant shall be deemed to have become permanent after he served the Government for such a long period. The services of the appellant shall be treated to be in permanent capacity.*"

The learned counsel for the respondent State, on the basis of a plea taken in the counter affidavit, has submitted that a junior person being more meritorious can supersede a senior. I do not find any force in this argument because there does not arise any question of assessing comparative merits at the stage of confirmation of an employee. The plea taken by the respondents in the Counter-affidavit is misconceived. The respondents have not come forward with any reasonable plea as to why the junior person Sri Uttam Singh Nayal was confirmed on the post of Plantation Zamadar, ignoring the claim of the petitioner for such confirmation prior to Sri Nayal. In case, both the persons, namely, the petitioner and the junior person Shri Uttam Sing Nayal had been confirmed on the post of Plantation Zamadar in the year 1976 itself, even then Shri

Uttam Sing Nayal would not have been entitled to supersede the petitioner in the matter of promotion to the post of Forester in-as-much as the post of Forester as per Service Rules of 1951 is not a selection post; and promotion had to take place on the basis of seniority amongst the Plantation Zamadars and since the petitioner was admittedly senior to Sri Nayal, he would have been promoted to the post of Forester in the year 1976 itself earlier to Sri Uttam Singh Nayal, the junior person.

The counsel for the petitioner has submitted that the petitioner is entitled for notional promotion with consequential benefits of service including arrears of salary w.e.f. 25-05-1976, when junior to the petitioner was promoted to the post of Forester.

The learned counsel for the petitioner has placed reliance on a recent authority of this Court rendered in the Writ petition No. of 1630 (S/S) of 2004, Pan Singh Jeena Vs. State of Uttaranchal and others, wherein this court has held that an employee who is granted notional promotion on any post, he will be entitled for arrears of salary and other consequential benefits of service w.e.f. the date when he was entitled for promotion. The relevant Paragraph of the said judgment is reproduced below:

"*Accordingly, the writ petition is allowed. The respondents are directed to pay salary to the petitioner for the period when he was granted notional promotion on the post of Block Development Officer i.e. 20-10-2004 till the date when he retired form the services i.e. 31-12-2004. The petitioner is also entitled for all the consequential benefits. No order as to costs.*"

The counsel for the petitioner has further submitted that the petitioner is also entitled for interest @ 9% per annum on the amount of arrears of salary. In support of his submission, the learned counsel has placed reliance on an authority of the Allahabad High Court rendered in the case- P. Ram Murthy Vs. State of U.P and another , reported in 2005 (1) UPLBEC 668, wherein the Hon'ble High Court of Allahabad has granted interest @ 9% per annum to the petitioner on the amount of arrears of salary.

In view of the above, a writ of certiorari is issued quashing the impugned order dated 28-02-2005, Annexure-3 to the writ petition.

A writ of Mandamus is issued commanding the respondents to grant notional promotion to the petitioner on the post of Forester w.e.f. 25-05-1976 with all consequential benefits. The respondents are directed to release entire benefits/outstanding dues to the petitioner within a period of two months from the date of production of certified copy of this order before the respondents. In case the amount is not paid within the stipulated time the petitioner shall be entitled to get interest on all the outstanding dues @ 6% per annum.

Accordingly, writ petition is allowed. No order as to costs.

Date: 3.3.2006 **Rajesh Tandon J.**

*Dhyani